

Anaheim Operating, Inc., d/b/a Sheraton-Anaheim Hotel and International Union of operating Engineers, Local Union No. 501, AFL-CIO. Case 21-CA-19876

April 30, 1981

### DECISION AND ORDER

Upon a charge filed on January 12, 1981, by International Union of Operating Engineers, Local Union No. 501, AFL-CIO, herein called the Union, and duly served on Anaheim Operating, Inc., d/b/a Sheraton-Anaheim Hotel, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 21, issued a complaint and notice of hearing on January 29, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 27, 1980, following a Board election in Case 21-RC-16250, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about December 29, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 20, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with exhibits attached. Subsequently, on February 27, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a document entitled "Response to the Motion for Summary

Judgment" as its response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits the request and refusal to bargain, but attacks the Union's certification on the ground that the Regional Director erred in finding the unit herein appropriate.

Review of the record herein, including the record in Case 21-RC-16250, reveals that on April 25, 1980, following a hearing, the Regional Director for Region 21 issued his Decision and Direction of Election wherein he found appropriate a unit of all operating engineers, maintenance employees, and paint and vinyl employees, excluding all other employees at Respondent's Anaheim, California, facility. Thereafter, Respondent filed a request for review of the Regional Director's decision. By telegraphic order dated June 20, 1980, the Board granted the request for review. On September 30, 1980, the Board issued its Decision on Review<sup>2</sup> in which it adopted the Regional Director's findings and conclusions with respect to the appropriateness of the unit. Pursuant thereto, an election was conducted on October 17, 1980, under the direction and supervision of the Regional Director for Region 21 in the unit found appropriate, which resulted in a majority of the ballots being cast in favor of the Union. No party filed objections to the election, and, on October 27, 1980, the Regional Director certified the Union as the exclusive bargaining representative in the unit found appropriate. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the prior representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>3</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 21-RC-16250, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>2</sup> 252 NLRB 959.

<sup>3</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, is engaged in the business of operating a hotel in Anaheim, California. In the course and conduct of its business, Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives supplies and goods in excess of \$5,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

##### II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local Union No. 501, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All operating engineers, maintenance employees and paint and vinyl employees employed by the Employer at its 1015 West Ball Road, Anaheim, California, facility, excluding all other employees, office clerical employees, professional employees, supervisors as defined in the Act.

###### 2. The certification

On October 17, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on October 27, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 12, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 29, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since December 29, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

##### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

##### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the ap-

propriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Anaheim Operating, Inc., d/b/a Sheraton-Anaheim Hotel, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 501, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All operating engineers, maintenance employees, and paint and vinyl employees employed by Respondent at its 1015 West Ball Road, Anaheim, California, facility, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 27, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 29, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

Anaheim Operating, Inc., d/b/a Sheraton-Anaheim Hotel, Anaheim, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local Union No. 501, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All operating engineers, maintenance employees and paint and vinyl employees employed by the Employer at its 1015 West Ball Road, Anaheim, California, facility, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 1015 West Ball Road, Anaheim, California, facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

**WE WILL NOT** refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local Union No. 501, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

**WE WILL**, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All operating engineers, maintenance employees and paint and vinyl employees employed by the Employer at its 1015 West Ball Road, Anaheim, California, facility, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

**ANAHEIM OPERATING, INC., D/B/A  
SHERATON-ANAHEIM HOTEL**